

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

CLARKE and REBECCA WIXON,)
Plaintiff(s),) No. C 07-2361 JSW (BZ)
v.)
WYNDHAM RESORT DEVELOPMENT)
CORP., et al.,)
Defendant(s).)

**ORDER DENYING PLAINTIFFS'
MOTION TO COMPEL DEPOSITION
OF OBJECTOR-APPELLANTS**

Plaintiffs have moved to compel the depositions of two objector-appellants pursuant to Rule 27(b) of the Federal Rules of Civil Procedure, which authorizes the Court to permit a party to depose witnesses pending appeal in order "to perpetuate their testimony for use in the event of further proceedings in that court." Fed. R. Civ. Proc. 27(b). Depositions pending appeal are allowed only on a showing of the expected substance of the testimony of each deponent and the reasons for perpetuating testimony. Fed. R. Civ. P. 27(b)(2). The movant must show the need for *preserving* the evidence it seeks. In re City of El Paso, 887 F.2d 1103, 1105 (D.C. Cir. 1989) ("this rule requires a real showing of the

1 need for the preservation of the evidence"). The primary
2 reason to perpetuate testimony is to avoid possible loss of
3 testimony in any future proceedings in the district court
4 after the appeal - due to the passage of time or the
5 unavailability of witnesses - that would cause injustice.

6 See, e.g., Central Bank of Tampa v. Transamerica Ins. Group,
7 128 F.R.D. 285, 286 (M.D. Fla. 1989) (when the passage of time
8 or the unavailability of witnesses would cause injustice, the
9 court may allow the perpetuation of testimony pending appeal).

10 Here, rather than using Rule 27 to perpetuate testimony,
11 Plaintiffs are attempting to utilize it as a substitute for
12 discovery. Plaintiffs seek to depose the objector-appellants
13 in order to learn whether these individuals have standing or
14 would be appropriate class representatives in the event that a
15 new class action suit commences. This is not a proper use of
16 Rule 27. See 19th St. Baptist Church v. St. Peters Episcopal
17 Church, 190 F.R.D. 345, 348 (E.D. Pa. 2000) (Rule 27(b) is not
18 a substitute for discovery and its application must be
19 grounded primarily in the need to avoid any failure or delay
20 of justice.); Windsor v. Federal Executive Agency, 614 F.

21 Supp. 1255, 1264-65 (D. Tenn. 1984) (Rule 27(b) "applies only
22 in that special category of cases where it is necessary to
23 prevent testimony from being lost.") (quoting In re Ferkauf, 3
24 F.R.D. 89 (D.N.Y. 1943)). Plaintiffs make no argument that
25 there is a risk that certain information will be destroyed or
26 lost unless the objector-appellants are deposed pending the

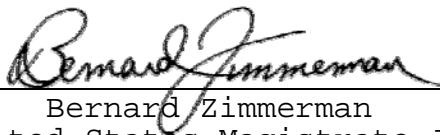
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1 appeal¹, and Plaintiffs cite to no authority to support their
 2 proposition that Rule 27(b) can be invoked in the manner they
 3 set forth. Plaintiffs rely primarily on a decision issued by
 4 the District Court of Maryland in In re Tyson Foods Inc.,
 5 Chicken Raised Without Antibiotics Consumer Litigation, Case
 6 No. 08-1982, for the proposition that Rule 27(b) permits
 7 extraordinary discovery pending appeal. (Pl.'s Mot. P. 5.)
 8 That order is less than one page in length and contains no
 9 substantive or legal analysis. Although Plaintiffs did not
 10 provide the Court with a copy of that unpublished decision,
 11 the Court reviewed both the parties' briefs as well as the
 12 court's order. It appears that the settlement agreement in
 13 Tyson specifically contemplated that the parties would be
 14 permitted to depose any objectors to the settlement - a fact
 15 Plaintiffs failed to disclose. Moreover, the party seeking
 16 the depositions in Tyson made a specific showing that certain
 17 evidence would in fact be lost if the objectors were not
 18 deposed. No such showing has been made in this case.

19 For the foregoing reasons, Plaintiffs' motion is **DENIED**.²

20 Dated: October 4, 2011


 21 Bernard Zimmerman
 22 United States Magistrate Judge

23 G:\BZALL\REFS\WIXON V. TRENDWEST\ORD ON PL'S MOT TO DEPOSE OBJECTOR APPELLANTS.FINAL VERSION BZ.wpd

24 ¹ Plaintiffs assert that Mr. Willett, counsel for the
 25 objector-appellants, allegedly deleted certain discussion
 26 threads on various websites pertaining to the class settlement
 27 reached in this case. (Pl.'s Mot. P. 7.) To the extent that
 this information has already been deleted, there is no way
 that it can possibly now be preserved. Moreover, Plaintiffs
 are not attempting to depose Mr. Willett.

28 ² Plaintiffs' Motion for Leave to File a Supplemental
 Opposition (Docket No. 1370) is **DENIED** as moot.